2019

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TELECOMMUNICATIONS AMENDMENT (REPAIRING ASSISTANCE AND ACCESS) BILL 2019

EXPLANATORY MEMORANDUM

Circulated by authority of Senator the Hon. Kristina Keneally
TELECOMMUNICATIONS AMENDMENT (REPAIRING ASSISTANCE AND ACCESS) BILL 2019

OUTLINE

The Telecommunications Amendment (Repairing Assistance and Access) Bill 2019 amends the Telecommunications Act 1997 to conform to the bipartisan recommendations that emerged from an inquiry by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), and introduce a judicial authorisation requirement to address concerns about the Act’s compatibility with commitments required under the United States Government’s CLOUD Act.

Specifically, the provisions of the Bill will:

- clarify the actions that designated communications providers must not be requested or required to do in a technical assistance request, a technical assistance notice or a technical capability notice;
- require the AFP Commissioner to not give approval for a technical assistance notices issued by the chief officer of an interception agency of a State or Territory unless the Commissioner is satisfied of certain things;
- remove the ability of the Minister for Home Affairs to edit and delete information in relevant reports prepared by the Commonwealth Ombudsman; and
- introduce a judicial authorisation requirement that requires an eligible judge to approve the giving or varying of a technical assistance request, a technical assistance notice or a technical capability notice, and for that eligible judge to be satisfied of certain things before approving this giving or varying.

FINANCIAL IMPACT STATEMENT

These amendments will have no financial impact.
NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short Title

1. This Act is the Telecommunications Amendment (Repairing Assistance and Access) Act 2019.

Clause 2: Commencement

2. Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Clause 3: Schedules

3. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Systemic weakness or systemic vulnerability

*Telecommunications Act 1997*

**Item 1–4 – Section 317B**

4. These items repeal the definitions of *election protection, systemic vulnerability, systemic weakness*, or *target technology*. These definitions are no longer relevant under the proposed amendments.

**Item 5 – Section 317ZG**

5. This item clarifies the actions that designated communications providers must not be requested or required to do in a technical assistance request, a technical assistance notice or a technical capability notice.

**Item 6 – Application provision**

6. This item ensures that this Bill does not impact technical assistance requests, technical assistance notices or a technical capability notices that were made prior to the commencement of this Schedule.

Schedule 2—Limiting technical assistance requests and technical capability notices to listed acts or things

*Telecommunications Act 1997*
Item 1–3 – Subsections 317G(6) and 317JA(10) and paragraph 317T(4)(c)

7. These items repeal and substitute language in order to limit the actions required of designation communications providers by removing the phrase “but are not limited to” from the relevant provisions.

Item 4 – Subsections 317T(5) and (6)

8. This item repeals the subsections which would allow the Minister for Home Affairs to determine additional acts or things that could be requested or required in a technical capability notice.

Schedule 3—Approval of technical assistance notices by the AFP Commissioner

Telecommunications Act 1997

Item 1 – After subsection 317LA(1)

9. This item inserts a new subsection 317LA(1A) which requires the AFP Commissioner to not give approval for a technical assistance notice issued by the chief officer of an interception agency of a State or Territory unless the Commissioner is satisfied that the requirements imposed by the notice are reasonable and proportionate, and that compliance with the notice is practicable and technically feasible.

Schedule 4—Ombudsman’s report of results of inspection of records

Telecommunications Act 1997

Item 1 – Subsection 317ZRB(7)

10. This item repeals the subsection which allows the Minister for Home Affairs to edit and delete information included in reports made by the Commonwealth Ombudsman relating to the records of relevant agencies.

Item 2 – Subsection 317ZRB(7)

11. This item ensures that this Bill does not impact reports received by the Minister for Home Affairs prior to the commencement of this Schedule.

Schedule 5—Judicial agreement to notice

Telecommunications Act 1997

Item 1 – Section 317B

12. This item inserts a definition of eligible judge into the relevant section by reference to section 317DA.
Item 2 – After section 317D

13. This item creates a definition of *eligible judge* in section 317DA for the purposes of sections 317P, 317Q, 317V and 317X as amended by this Bill.

Item 3 – Section 317P

14. This item inserts a safeguard by requiring that the Director-General of Security (or the chief officer) cannot issue a technical assistance notice to a designated communications provider unless an *eligible judge* has approved the giving of the notice. It also outlines a number of matters of which an *eligible judge* must be satisfied before the giving of the notice is approved.

Item 4 – Subsection 317Q(10)

15. This item inserts a safeguard by requiring that the Director-General of Security (or the chief officer) cannot vary a technical assistance notice to a designated communications provider unless an *eligible judge* has approved the giving of the notice. It also outlines a number of matters of which an *eligible judge* must be satisfied before the varying of the notice is approved.

Item 5 – Section 317V

16. This item amends the Act by inserting the requirement that the Director-General of Security (or the chief officer) cannot issue a technical assistance notice to a designated communications provider unless an *eligible judge* has approved the giving of the notice. It also outlines a number of matters of which an *eligible judge* must be satisfied before the giving of the notice is approved.

Item 6 – Subsection 317X(4)

17. This item inserts a requirement that the Director-General of Security (or the chief officer) cannot vary a technical assistance notice to a designated communications provider unless an *eligible judge* has approved the giving of the notice. It also adds a new subsection 317X(4A) that outlines a number of matters of which an *eligible judge* must be satisfied before they approve the varying of the notice.

Schedule 6—Other amendments

*Telecommunications Act 1997*

Item 1 – Subparagraph 317WA(7)(a)(i)

18. This item includes reference to section 317ZGA in the subparagraph.

Item 2 – After subsection 317YA(6)

19. This item inserts new subsection 317YA (6A) which lists a number of matters on which the assessors must consider when assessing whether a proposed technical capability notice should be varied. This provides that proposed variations to technical capability notices are assessed in the same way as proposed technical capability notices.
Item 3 – After subsection 317ZF(16)

20. This item inserts new subsection 317ZF(16A) which would require the Attorney-General to authorise the designated communications provider to disclose *specified technical capability notice information*, except to the extent that disclosure would prejudice a particular investigation or prosecution and unless the Attorney-General determines that there are operational reasons for the disclosure not to be made, and pursuant to conditions of the authorisation.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

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Specifically, the provisions of the Bill will:

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Human rights implications

The provisions in this Bill seek to increase transparency and oversight of the Assistance and Access laws. Primarily, they both clarify and limit the actions that an individual or company would be requested or required to do under the law, and introduce a judicial authorisation requirements that serves to increase the scrutiny of the notices when they are made or varied.

As such, this Bill has a positive impact on human rights, and does not create human rights issues.
Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Senator the Hon. Kristina Keneally